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IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

No. [redacted]275

PAN AMERICAN WORLD AIRWAYS, INC.,
Petitioner,

v.

CIVIL AERONAUTICS BOARD,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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TABLE OF CONTENTS

	PAGE
CITATIONS TO OPINIONS BELOW	1
JURISDICTION	2
QUESTION PRESENTED	2
CONSTITUTIONAL PROVISION AND STATUTES INVOLVED	2
STATEMENT	2
REASONS FOR GRANTING THE WRIT:	
A. The decision of the Court of Appeals conflicts with applicable decisions of this Court	6
B. The Court of Appeals decided an important question of Federal law which has not been but which should be settled by this Court	10
Conclusion	13
Appendix A—Statutory provisions	15
Appendix B—Opinion below	21

Citations

CASES:

Baltimore & Ohio Railroad Co. v. U. S., 345 U. S. 146 (1953)	8, 10, 11
Hudson & Manhattan R. Co. v. United States, 313 U. S. 98 (1941)	9
Kimball Laundry Co. v. U. S., 338 U. S. 1 (1949)	7
King v. United States, 344 U. S. 254 (1952)	11

PAGE

Market Street R. Co. v. *Railroad Commission of California*, 324 U. S. 548 (1945) 8

Northern Pacific Railway Co. v. *North Dakota*, 236 U. S. 585 (1915) 7, 8

Public Service Commission of Utah v. *United States*, 356 U. S. 421 (1958) 12

Railway Express Agency v. *Civil Aeronautics Board*, 100 U. S. App. D. C. 165, 243 F. 2d 422 (1957) 8

St. Louis & S. F. R. Co. v. *Gill*, 156 U. S. 649 (1895) 8

United States v. *Jones*, 336 U. S. 641 (1949) 9, 11

United States v. *New York Central Railroad Co.*, 279 U. S. 73 (1929) 7

CONSTITUTION:

Constitution of the United States, Amendment V 2, 7

STATUTES:

Civil Aeronautics Act of 1948, 49 U. S. C. 401 *et seq.* 2, 3, 7

Reorganization Plan No. 10 of 1953, 67 Stat. 644 ..... 2, 3, 19

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Pan American World Airways, Inc., your Petitioner, prays that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the District of Columbia Circuit entered in the above-entitled case on May 22, 1958.

Citations to Opinions Below

The opinion of the Civil Aeronautics Board, printed at R. 8-59,* is as yet unpublished except in mimeographed

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* Record references are to the printed Joint Appendix filed by the parties below and submitted here pursuant to Rule 21(3) of this Court. Pursuant to Rule 21(4), nine additional copies of such Appendix have been filed for consideration by this Court.

form as Order No. E-11060. The opinion of the United States Court of Appeals, printed in Appendix B, *infra*, is reported in F. 2nd

Jurisdiction

The judgment of the Court of Appeals was entered on May 22, 1958. The jurisdiction of this Court is invoked under 28 U.S.C., Section 1254(1).

Question Presented

Can the United States lawfully require an air carrier to transport United States mail at rates which fail to meet the carrier's costs (including properly allocated common costs) and provide no return on investment?

Constitutional Provision and Statutes Involved

The pertinent portions of Amendment V of the Constitution of the United States, of Sections 401, 405, 406 and 1006 of the Civil Aeronautics Act of 1938, and of Reorganization Plan No. 10 of 1953, are printed in Appendix A, *infra*.

Statement

Petitioner, Pan American World Airways, Inc. ("Pan American"), is an air carrier engaged in the transportation by air of persons, property and mail under certificates of public convenience and necessity issued by the Civil Aeronautics Board ("Board") pursuant to the provisions of Section 401 of the Civil Aeronautics Act of 1938, 49 U.S.C., Section 481. These certificates include a certificate authorizing such transportation between various

cities on the West Coast of the United States and Japan. Operations over that route, as well as other authorized operations in the Pacific area, are conducted by a division of Pan American called the Pacific Division.

The Civil Aeronautics Act provides, in Section 401(m), that holders of mail certificates "shall provide necessary and adequate facilities and service for the transportation of mail, and shall transport mail whenever required by the Postmaster General," for which the air carrier "shall be entitled to receive reasonable compensation." Section 406 provides that the Board shall fix and determine "the fair and reasonable rates of compensation" to be paid by the Postmaster General. While Section 406, as enacted, provided that these rates should, under certain conditions, include a subsidy element, Reorganization Plan No. 10 of 1953, 67 Stat. 644, directed complete and formal separation of subsidy from compensation for the carriage of mail by requiring the Board to fix the rates to be paid by the Postmaster General at a fair and reasonable level for the mail service as such, with any additional amount required as subsidy to be paid by the Board.

The service rate established by the Board to be paid Pan American by the Postmaster General for the transportation of mail between the West Coast and Tokyo, on and after April 1, 1955, was 46.44¢ per mail ton mile (*i.e.*, the carriage of a ton of mail one mile, or a pound of mail 2,000 miles), subject to a proviso that "the mail ton miles shall be computed on a standard mileage of 5,078 miles."

Pan American's objection relates to this proviso. As against this so-called "standard mileage of 5,078 miles", restrictions in Pan American's certificate compelled Pan American to detour by a much longer route via a mid-Pacific island, and its most frequently operated route was

6,688 miles between San Francisco and Tokyo, and even further between Seattle Portland and Tokyo.* The "standard mileage of 5,078 miles" was not the mileage which Pan American was permitted to fly, but the mileage of the route most frequently operated by Pan American's American-flag competitor, Northwest Airlines, Inc., which operates between Seattle and Tokyo without restrictions on its freedom to fly the shortest and most direct route (R. 102).** The rate of 46.44c per ton mile fixed for Pan American applied to this fictitious "standard mileage" of 5,078 miles, is, in fact, the same rate which had previously been established by the Board as the fair and reasonable rate for Northwest Airlines (Order No. E-9958, adopted January 31, 1956).***

The effect of paying Pan American for only 5,078 miles was to reduce its actual compensation between San Francisco and Tokyo from 46.44c to only 35.26c per mail ton mile. Stated differently, whereas on the basis of the Board's own findings as to Pan American's costs, Pan American should be paid $3,022.98 for carrying a ton of mail between San Francisco and Tokyo (45.20c x 6,688 miles), under the Board's Order Pan American is actually paid only $2,358.22 (46.44c x 5,078 miles). The rate of 35.26c per mail ton mile thus established by the Board

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* Almost all of the mail affected by the mileage proviso was carried by Pan American to or from San Francisco (R. 83).

** In a separate later proceeding, the Board freed Pan American of the detour requirement between San Francisco and Tokyo, effective October 1, 1957 (Order No. E-11648). This permitted Pan American to operate a portion of its service between San Francisco and Tokyo by a route shorter than 6,688 miles but still longer than the 5,078 miles between Seattle and Tokyo. Part of Pan American's service must continue to be routed via Hawaii to perform its certificate obligations.

*** Pan American's own costs (including return on investment) would have justified a rate of 45.20c per ton mile, assuming full recognition of mileage actually flown (R. 101).

does not even cover Pan American's operating expenses, which the Board itself computed to be 39.72c per mail ton mile (including allocated costs in accordance with the Board's consistent practice), and allows nothing for return on investment. On the basis of the Board's estimate, prepared in relation to the calendar year 1955, the use of the "standard mileage" reduced Pan American's service mail pay for 1955 by $814,000 (R. 101). While for the period through September 30, 1956, this reduction in service mail pay led to an equivalent addition to Pan American's subsidy mail pay, since that date Pan American has been on a temporary mail rate providing no subsidy and has suffered continuing loss for each pound of mail which it is compelled to carry on a non-compensatory basis.

United States mail is one of the principal categories of traffic between the United States and Tokyo, accounting for 22.2% of the total poundage carried by Pan American over this route during the period April through December, 1955 (R. 103-23).

Taking Pan American's Pacific operations as a whole, the agreed cost to Pan American of carrying United States mail was 47.20c per ton mile, consisting of 41.59c for operating expenses and 5.61c for taxes and return on investment. As a result of the below cost West Coast-Tokyo rate, however, the effective rate for the entire Division is only 41.74c per ton mile (R. 101), which barely covers operating expense and provides a *de minimis* amount for return on investment and taxes.

Further, although Pan American also operates in other areas, through other Divisions, the Board's procedures and standards for fixing service mail rates are such that none of the rates for these other services contains any allowance in excess of the cost of carrying the mail plus a fair return on the allocated investment. Since the Pacific Division rate was less than compensatory it follows that

total compensation for all mail service performed by Pan American was less than compensatory.

Pan American protested the West Coast-Tokyo rate before the Board, urging, *inter alia*, that it is entitled, under the statute and the Constitution, to be paid its costs plus a reasonable return on its investment for compulsory mail service. However, the Board rejected Pan American's contentions and held that the rate was reasonable on the ground that the Postmaster General had no "need" for Pan American's circuitous service and should not be required to pay for the added mileage; that Pan American would obtain greater mail revenue with the same rate per ton to Tokyo as Northwest Airlines than with a higher rate; and that this would benefit Pan American and the Government.

The Court of Appeals for the District of Columbia Circuit affirmed, except that it modified the order in one respect not relevant here. In essence, it held that Pan American had failed to establish that the rate was unfair and unreasonable, as applied to it because "a carrier may be required to charge for a particular service a rate which is not fully compensatory," provided it is not thereby caused to lose money on its over-all business.

Reasons for Granting the Writ

A. The decision of the Court of Appeals conflicts with applicable decisions of this Court.

Petitioner made two basic arguments in support of its contention that the below cost rate established for it by the Board for the carriage of mail between the West Coast and Tokyo was illegal. Each of these arguments rested on decisions of this Court interpreting the Constitution of the United States, and the decision of the

Court of Appeals either ignores or is in conflict with such decisions.

(1) Petitioner relied first on *Northern Pacific Railway Co. v. North Dakota*, 236 U. S. 585 (1915), which held:

a) that the determination of cost for the purpose of establishing compensatory rates under the Constitution must include a fair allocation of common costs (236 U. S. at 596); and

b) that a rate requiring a carrier to transport any significant category of traffic at less than the fully allocated costs (including capital costs) is unlawful (236 U. S. at 604).

These same requirements are inherent in the Board's statutory duty to establish "fair and reasonable rates of compensation." Although the order of the Board and the decision of the Court of Appeals clearly conflict with *Northern Pacific*, they did not even refer to that decision.

(2) Petitioner also contended that the rate established by the Board deprived it of its constitutional right under the Fifth Amendment to "just compensation." The Government itself is the user of the service which it compelled Pan American to perform, under conditions and circumstances controlled by the Government. It is settled that a carrier which is compelled to transport United States mail has a "constitutional right" to "reasonable compensation" for such required services. *United States v. New York Central Railroad Co.*, 279 U. S. 73 (1929). Further, the notion that the level of "reasonable compensation" depends in any way on the degree to which the Government needs the requisitioned services, or on the cost of alternative service, is fallacious and in conflict with *Kimball Laundry Co. v. U. S.*, 338 U. S. 1 (1949), which makes clear that the Government must pay full compen-

sation for what it takes without regard to whether or not it makes full use of what it has taken. "The question is" this Court stated "what has the owner lost, not what has the taker gained" (338 U. S. at 13).

Although it did not so state, the Court below seemingly assumed that the foregoing decisions were rendered inapplicable by *Baltimore & Ohio Railroad Co.* v. *U. S.*, 345 U. S. 146 (1953)*. This Court there held, without questioning the principle of *Northern Pacific*, that the Interstate Commerce Commission could require railroads to carry certain vegetables at less than cost in the absence of an allegation that the challenged rates would make any railroad carry all fresh vegetables at a loss, where this was but one of a long series of Commission orders dealing with the fresh vegetable rate pattern. This decision to allow the Interstate Commerce Commission reasonable discretion to make "minor alterations in a vast, complex network of rates that apply to fresh shipments throughout the Nation" (345 U. S. at 148)** does not allow the Civil Aeronautics Board to fix a confiscatory rate for the carriage of United States mail, a distinct category of traffic

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* While the Court below also referred to *Market Street Railway Co.* v. *Railroad Commission of California*, 324 U. S. 548 (1945) and its own decision in *Railway Express Agency* v. *Civil Aeronautics Board*, 243 F. 2nd 422 (C.A.D.C. 1957), along with *Baltimore & Ohio*, these decisions are so plainly inapposite as to require little discussion. The *Railway Express Agency* case held only that a carrier may *voluntarily* establish air freight rates which do not fully meet all costs of transportation, despite objections of a competitor. The *Market Street Railway* case sustained a rate which was fair and reasonable on the basis of the actual market value of the properties of a company engaged in an obsolescent form of transportation but inadequate on the basis of the substantially higher book value of the properties, stating that "the due process clause * * * cannot be applied * * * to restore values that have been lost by the operation of economic forces" (324 U. S. at 567); no such situation exists here.

** *Northern Pacific* itself recognized that rate making bodies have the degree of discretion permitted in *B&O*, as is clear from the discussion in *Northern Pacific* (236 U. S. at 600) of *St. Louis & S.F.R. Co.* v. *Gill*, 156 U. S. 649 (1895).

which, in 1955, accounted for more than 20% of Pan American's total load between the United States and Tokyo—particularly when such rate results in a non-compensatory rate for all U. S. mail service performed by Pan American.

The Court below relied on *United States* v. *Jones*, 336 U. S. 641 (1949), where this Court held that a railroad had failed to establish that a mail rate was "unfair and unreasonable as applied to it" (336 U. S. at 665). In that case, however, the record did not show—what is shown here—that the rate was below cost. Thus, the question stated by this Court was what method of computation of cost "should be taken as determinative of costs *and thus of fair and reasonable rates*" (336 U. S. at 662; emphasis added). The decision contains not the slightest suggestion that the Government can lawfully require mail to be carried at less than cost, including a fair allocation of common costs, and all costs found reasonable were allowed. Here, on the basis of the Board's own findings, the rate established for Petitioner failed to comply with that fundamental standard.

Referring to *Hudson & Manhattan R. Co.* v. *United States*, 313 U. S. 98 (1941), the Court below stated that the Board "was right in giving weight" to its finding that Pan American was better off with the same rate as Northwest since it would thereby obtain greater mail revenue than with a higher rate. However, not only is it for Pan American's management to make this type of business decision—and its judgment was different from that of the Board—but *Hudson & Manhattan* did not involve a less than compensatory rate for the traffic to which the rate under review applied.*

* In that case this Court, in a *per curiam* opinion, sustained a determination of the Interstate Commerce Commission which authorized a fare increase from 6¢ to 8¢ on a service from New Jersey to down-

B. The Court of Appeals decided an important question of Federal law which has not been but which should be settled by this Court.

Petitioner contended and showed not only that the West Coast-Tokyo mail rate was less than compensatory but that—as a result of the noncompensatory rate for this service—the mail rates fixed for its entire Pacific Division, and for all its U. S. mail carriage, were noncompensatory. But the Court of Appeals ignored all this and, after referring to the statement in *Baltimore & Ohio, supra*, that "So long as a railroad is not caused by such regulations to lose money on its over-all business, it is hard to think that its property was being taken for public use 'without just compensation'" (345 U. S. at 148), went on to state:

> "Pan American does not contend it will lose money on its over-all Tokyo business, which includes carrying passengers and freight as well as mail."

This reasoning, and such reliance on *Baltimore & Ohio*, raise the important question, which has not been but should be settled by this Court, whether a noncompensatory rate can lawfully be established for the compulsory carriage of U. S. mail where, as a result of revenues from

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town New York and disapproved the increase to 10¢ proposed by the carrier. The decision of the Interstate Commerce Commission, 227 I.C.C. 741 (1938), shows that the railroad operated two services between New Jersey and New York City, one a short line to downtown New York and the other a long line to uptown New York. The downtown line was profitable, the uptown line was unprofitable, and the aggregate net income insufficient to provide a fair return. The fare increase was proposed only for the downtown line, with the intention of generating enough profit from that service to provide the carrier with a fair return on its total operations. The instant case is clearly distinguishable on the facts, since there was no question that the 8¢ fare fixed by the Commission produced more than an adequate return for the traffic to which it applied.

other nonmail traffic, the carrier is not caused by such mail rate to lose money on its over-all business.

The implications of the opinion of the Court of Appeals are frightening. If less than compensatory rates can lawfully be established for compulsory mail service where revenues from other traffic support the combined operation at a profit, then there is no practical restraint on the Government's power to commandeer mail service without any compensation at all. This clearly would be illegal, and there is no logical or legal basis for sustaining a mail rate which, while providing some payment, does not meet the cost of rendering the service.

This important question was neither raised nor decided in *United States* v. *Jones*, *supra*, where the issue was whether the Interstate Commerce Commission had fairly determined the cost of mail service. No one sought to sustain the ruling of the Commission on the ground, relied on here by the Court of Appeals, that the railroad was not losing money on its over-all business.

The very fact that the court below thought that *Baltimore & Ohio* supports a less than compensatory mail rate if revenues from nonmail traffic result in an over-all profit emphasizes the necessity for clear-cut decision by this Court. In our view, the court below sorely overextended *Baltimore & Ohio*. Indeed, even the practice of considering passenger deficits in fixing freight rates is limited to those cases where "interstate passenger service inevitably and inescapably cannot bear its direct costs and its share of joint or indirect costs." *King* v. *United States*, 344 U. S. 254, 261 (1952). The discrimination against the shipper and the ultimate consumer of the freight which this entails may have been thought unavoidable with respect to railroad passenger transportation, but there has been no determination—nor would there be any conceivable basis for one—that the U. S. mail service "inevitably and inescapably

cannot bear its direct costs and its share of joint or indirect costs."

It is also important that this Court consider whether complex and unclear rail rate making principles are to be applied to the newer field of air transportation. As Mr. Justice Frankfurter stated in his dissenting opinion in *Public Service Commission of Utah* v. *United States*, 356 U. S. 421 (1958):

> "There comes a time in the development of law, especially when it concerns as complex and important a subject as that in the present case, when a comprehensive survey must be made and the cumulative effect of episodic instances appraised to determine whether or not they reveal a harmonious whole. Case by case adjudication, without scrutiny of underlying generalizations or presuppositions, must culminate in an effort to determine whither we are going, and whether the direction cut by the specific instances should be further pursued or represents a deviation from the path demanded by the purpose of the regulatory legislation." (page 429)

It is even more important that a proper start be made toward achieving a "harmonious whole" in the still largely undeveloped field of air transportation law.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A

STATUTORY PROVISIONS

Constitution of the United States

Amendment V—Capital Crimes; Due Process.

"No person shall be * * * deprived of property without due process of law; nor shall private property be taken for public use, without just compensation."

Civil Aeronautics Act, 49 USC 401

Section 401 *Certificates of Public Convenience and Necessity* (49 USC 481)

"Requirement as to Carriage of Mail

(m) Whenever so authorized by its certificate, any air carrier shall provide necessary and adequate facilities and service for the transportation of mail, and shall transport mail whenever required by the Postmaster General. Such air carrier shall be entitled to receive reasonable compensation therefor as hereinafter provided."

Section 405 *Transportation of Mail* (49 USC 485)

"Mail Schedules

(e) Each air carrier shall, from time to time, file with the Authority and the Postmaster General, a statement showing the points between which such air carrier is authorized to engage in air transportation, and all schedules, and all changes therein, of aircraft, regularly operated by the carrier between such points, setting forth in respect of each such schedule the points served thereby and the time of arrival and departure at each such point. The Postmaster General may designate any such

schedule for the transportation of mail between the points between which the air carrier is authorized by its certificate to transport mail, and may, by order, require the air carrier to establish additional schedules for the transportation of mail between such points. . . ."

Section 405 *Transportation of Mail* (49 USC 485)

"Tender of Mail

(g) From and after the issuance of any certificate authorizing the transportation of mail by aircraft, the Postmaster General shall tender mail to the holder thereof, to the extent required by the Postal Service, for transportation between the points named in such certificate for the transportation of mail, and such mail shall be transported by the air carrier holding such certificate in accordance with such rules, regulations, and requirements as may be promulgated by the Postmaster General under this section."

Section 406 *Rates for Transportation of Mail* (49 USC 486)

"Authority to Fix Rates

(a) The Authority is empowered and directed, upon its own initiative or upon petition of the Postmaster General or an air carrier, (1) to fix and determine from time to time, after notice and hearing, the fair and reasonable rates of compensation for the transportation of mail by aircraft, the facilities used and useful therefor, and the service connected therewith (including the transportation of mail by an air carrier by other means than aircraft when-

ever such transportation is incidental to the transportation of mail by aircraft or is made necessary by conditions of emergency arising from aircraft operation), by each holder of a certificate authorizing the transportation of mail by aircraft, and to make such rates effective from such date as it shall determine to be proper; (2) to prescribe the method or methods, by aircraft-mile, pound-mile, weight, space, or any combination thereof, or otherwise, for ascertaining such rates of compensation for each air carrier or class of air carriers; and (3) to publish the same; and the rates so fixed and determined shall be paid by the Postmaster General from appropriations for the transportation of mail by aircraft."

Section 406 *Rates for Transportation of Mail* (49 USC 486)

"Rate-Making Elements

(b) In fixing and determining fair and reasonable rates of compensation under this section, the Authority, considering the conditions peculiar to transportation by aircraft and to the particular air carrier or class of air carriers, may fix different rates for different air carriers or classes of air carriers, and different classes of service. In determining the rate in each case, the Authority shall take into consideration among other factors, the condition that such air carriers may hold and operate under certificates authorizing the carriage of mail only by providing necessary and adequate facilities and service for the transportation of mail; such standards respecting the character and quality of service to be rendered by air carriers as may be prescribed by or pursuant to law; and the

need of each such carrier for compensation for the transportation of mail sufficient to insure the performance of such service, and, together with all other revenue of the air carrier, to enable such air carrier under honest, economical and efficient management, to maintain and continue the development of air transportation to the extent and of the character and quality required for the commerce of the United States, the Postal Service, and the national defense."

Section 1006 *Judicial Review of Authority's Orders* (49 USC 646)

"Orders of Authority Subject to Review

(a) Any order, affirmative or negative, issued by the Authority under this Act, except any order in respect of any foreign air carrier subject to the approval of the President as provided in section 801 of this Act, shall be subject to review by the circuit court of appeals of the United States or the United States Court of Appeals for the District of Columbia upon petition, filed within sixty days after the entry of such order, by any person disclosing a substantial interest in such order. After the expiration of said sixty days a petition may be filed only by leave of court upon a showing of reasonable grounds for failure to file the petition theretofore."

Section 1006 *Judicial Review of Authority's Orders* (49 USC 646)

"Venue

(b) A petition under this section, shall be filed in the court for the circuit wherein the petitioner

resides or has his principal place of business or in the United States Court of Appeals for the District of Columbia."

Reorganization Plan No. 10 of 1953, 67 Stat. 644

"*Payments to Air Carriers*

Section 1. *Transfer of functions.*—There are hereby transferred to the Civil Aeronautics Board (hereinafter referred to as the 'Board') the functions of the Postmaster General with respect to paying to each air carrier so much of the compensation fixed and determined by the Board under section 406 of the Civil Aeronautics Act of 1938 (52 Stat. 998, as amended; 49 U.S.C. 486), as is in excess of the amount payable to such air carrier, under honest, economical and efficient management, for the transportation of mail by aircraft, the facilities used and useful therefor, and the services connected therewith at fair and reasonable rates fixed and determined by the Board in accordance with that section without regard to the following provision of subsection (b) thereof: 'the need of such carrier for compensation for the transportation of mail sufficient to insure the performance of such service, and, together with all other revenue of the air carrier, to enable such air carrier under honest, economical, and efficient management, to maintain and continue the development of air transportation to the extent and of the character and quality required for the commerce of the United States, the postal service, and the national defense.'"

APPENDIX B

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 13817

PAN AMERICAN WORLD AIRWAYS, INC., PETITIONER

v.

CIVIL AERONAUTICS BOARD, RESPONDENT

On Petition for Review of an Order of the Civil Aeronautics Board

---

Decided May 22, 1958

Mr. Henry J. Friendly, with whom *Mr. Robert C. Barnard* was on the brief, for petitioner.

Mr. Morris Chertkof, Attorney, Civil Aeronautics Board, with whom *Messrs. Franklin M. Stone*, General Counsel, Civil Aeronautics Board, *John H. Wanner*, Associate General Counsel, Civil Aeronautics Board, *O. D. Ozment*, Assistant General Counsel, Litigation and Research, Civil Aeronautics Board, and *Daniel M. Friedman*, Attorney, Department of Justice, were on the brief, for respondent.

Before EDGERTON, *Chief Judge*, and BAZELON and BURGER, *Circuit Judges*.

EDGERTON, *Chief Judge*: Northwest flies a short route between Seattle and Tokyo. Pan American, under its certificate from the Civil Aeronautics Board, flies a much

longer route, via Hawaii, between San Francisco and Tokyo. The Board fixed the same "service" rate, computed on the basis of the shorter Northwest mileage, to be paid by the Postmaster General for carrying mail to and from Tokyo by either route. Pan American contends this equalized rate fails to meet the statutory "fair and reasonable" standard and the Fifth Amendment "just compensation" standard because, although the rate more than covers out-of-pocket costs, it does not cover fully allocated costs plus on including a return on allocated investment.

The burden of proof is on Pan American to show that the rate is "unfair and unreasonable as applied to it." *United States* v. *Jones*, 336 U.S. 641, 665. We think it has not shown this. The Board says Pan American is better off by reason of the "equalized" rate than it would be if rates were based on actual mileage, because the Postmaster General would then give Northwest nearly all Tokyo mail and this would take away a good deal of Pan American's revenue. We think the Board was right in giving weight to this fact. *Hudson & Manhattan R. Co.* v. *United States*, 313 U.S. 98. "It is not theory but the impact of the rate order which counts. If the total effect of the rate order cannot be said to be unjust and unreasonable, judicial inquiry under the Act is at an end." *Federal Power Commission* v. *Hope Natural Gas Co.*, 320 U.S. 591, 602.

A carrier may be required to charge for a particular service a rate that is not fully compensatory, in the sense that it does not cover fully allocated costs and return. *B. & O. R. Co.* v. *United States*, 345 U.S. 146; *Market Street R. Co* v. *Railroad Commission of California*, 324

U.S. 548. *Cf. Railway Express Agency* v. *Civil Aeronautics Board*, 100 U.S. App. D.C. 165, 243 F. 2d 422. "So long as a railroad is not caused by such regulations to lose money on its over-all business, it is hard to think that it could successfully charge that its property was being 'taken for public use 'without just compensation'." *B. & O. R. Co.* v. *United States*, *supra* at 148. Pan American does not contend it will lose money on its over-all Tokyo business, which includes carrying passengers and freight as well as mail.

But for one point, we would affirm the Board's order. Pan American says the service rate should at least include an allowance for carrying mail between San Francisco and Seattle. We think this contention is valid as far as it is applicable; but it is applicable only to so much of Pan American's Tokyo mail as comes from or goes to such points that if it were carried between Seattle and Tokyo it would have to be carried between Seattle and San Francisco. We think the Board should determine how much mail is in this category and revise its order accordingly.

Modified and affirmed.

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In the Supreme Court of the United States

OCTOBER TERM, 1958

PAN AMERICAN WORLD AIRWAYS, INC., PETITIONER

v.

CIVIL AERONAUTICS BOARD

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF FOR THE CIVIL AERONAUTICS BOARD IN OPPOSITION

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INDEX

	Page
Opinions below	1
Jurisdiction	1
Question presented	2
Statutes involved	2
Statement	2
Argument	6
Conclusion	11
Appendix	12

CITATIONS

Cases:

B. & O. R. Co. v. *United States*, 345 U.S. 146	7, 9
Delta Air Lines v. *Summerfield*, 347 U.S. 74	3
Federal Power Commission v. *Hope Natural Gas Co.*, 320 U.S. 591	9
Hudson & Manhattan R. Co. v. *United States*, 313 U.S. 98	8
Market Street Ry Co. v. *Railroad Commission of California*, 324 U.S. 548	8
Northern Pacific Railway Co. v. *North Dakota*, 236 U.S. 585	7
T.W.A. v. *Civil Aeronautics Board*, 336 U.S. 601	9
United States v. *Jones*, 336 U.S. 641	8, 9

Statutes:

Civil Aeronautics Act, as amended, 49 U.S.C. 401, *et seq.*:	
Section 404	8
Section 406	3, 7, 9, 12
Reorganization Plan No. 10 of 1953, 67 Stat. 644	2, 3, 4, 13

In the Supreme Court of the United States

OCTOBER TERM, 1958

No. 275

PAN AMERICAN WORLD AIRWAYS, INC., PETITIONER

v.

CIVIL AERONAUTICS BOARD

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF FOR THE CIVIL AERONAUTICS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the United States Court of Appeals for the District of Columbia Circuit (Pet., App. B) is not yet reported. The findings and order of the Civil Aeronautics Board (R. 8, 21, 24) are not yet reported.

JURISDICTION

The judgment of the Court of Appeals was entered on May 22, 1958. The petition for a writ of certiorari was filed on August 12, 1958. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the Civil Aeronautics Board may fix a standard rate for United States-Tokyo mail carriage based on the mileage flown by a competing airline and apply that rate to petitioner which flies a more circuitous route, so that petitioner's fully allocated costs for such carriage are not defrayed although out-of-pocket expenses are recovered, where the Board found that petitioner's net revenue position would be benefited since, if the rates were not "equalized", it would lose this traffic to the competing airline.

STATUTES INVOLVED

Pertinent provisions of the Civil Aeronautics Act, and Reorganization Plan No. 10 of 1953, are set forth in the Appendix, *infra*, pp. 12-15.

STATEMENT

The petitioner operates world-wide air routes for the transportation of persons, property and mail, under certificates of public convenience and necessity issued by the Civil Aeronautics Board. Certain of its routes extend from San Francisco and Seattle, on the one hand, to Tokyo on the other, via Hawaii and other Pacific Islands, and these routes are a part of the carrier's Pacific Division.[1] Northwest Airlines, Inc., also conducts air operations between Seattle and Tokyo, but via the more direct "Great Circle" route.

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[1] The Pacific Division also encompasses routes west of Hawaii to points in Australia and India. There are three other divisions of the carrier: the Atlantic, Alaska, and Latin American divisions.

The Northwest and Pan American routes to Tokyo are fully competitive for United States traffic generally, and passenger and cargo rates are uniform despite the more circuitous Pan American routing and the fact that it serves California cities, whereas Northwest does not.

Rates for the transportation of mail are fixed by the Board pursuant to Section 406 of the Civil Aeronautics Act (*infra*, pp. 12-13), and may include a subsidy. See, *e.g.*, *Delta Air Lines* v. *Summerfield*, 347 U.S. 74. Prior to 1953, all mail rates, whether embodying a subsidy element or fixed only at a compensatory level, were "paid by the Postmaster General from appropriations for the transportation of mail by aircraft" (Section 406(a), *infra*, p. 12), and the Board was not required to differentiate between the subsidy and compensatory (or "service") portions of the rate. Moreover, since all rates were paid from the Postmaster General's appropriations, rate differentials between various carriers seldom were an important factor in his distribution of mail between carriers. However, Reorganization Plan No. 10 of 1953 (*infra*, pp. 13-15) required a separation of subsidy from service pay, with the Postmaster General paying the service portion of the rate, and the Board the subsidy. The practical effect was that, for subsidized carriers, the Board must fix what are, in substance, two mail rates.[2]

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[2] Prior to 1953, subsidy rates generally were fixed in terms of mileage flown as opposed to mail actually transported, whereas compensatory or service rates were fixed in terms of a specific rate for each pound (per ton-mile) actually

Shortly after the effective date of Reorganization Plan No. 10, the Postmaster General announced his intention to use the carrier which charged him the lowest rate when air mail service would not be impaired. Consequently, to insure an over-all equitable distribution of mail at fair and reasonable rates, to provide maximum mail service, and to guard against subsidy-free carriers obtaining the bulk of the mail with the Board being required to make up the loss to the subsidized carriers in the form of increased subsidy, it became necessary to provide uniform rates for the same services to the Post Office Department. The present controversy stems from this practice, and represents the only court challenge to the Board's extensive revision of existing mail rates to accomplish rate uniformity for like service.[3]

The Board order here involved (R. 21) in effect made final an earlier temporary order, whereby, for the period April 1, 1955 forward, Pan American's service rate to be paid by the Postmaster General for United States-Tokyo mail was "equalized" with the Northwest rate. Such equalization was accomplished by providing that the rate for Tokyo mail shall be computed "on a standard mileage of 5078 miles" (R. 23), which mileage is the distance flown by

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transported. Mail rates continue to be fixed in the same fashion except that, for subsidized carriers, the "subsidy rate" orders now contain a provision for automatic offset of "service" pay received from the Post Office Department.

[3] In the instant proceeding, petitioner voluntarily sought, and obtained, rate "equalization" with United Air Lines for mail transportation between San Francisco and Los Angeles on the one hand, and Honolulu on the other.

Northwest to Tokyo over its more direct routing. The Board's order rests on findings, both as to the past and the future, that equalization (1) precludes a loss of some 90% of the Pan American Tokyo mail to Northwest with a consequent $2,000,000[1] annual mail revenue loss to Pan American (R. 10, 35-37), (2) improves Pan American's net revenue position (R. 10), and (3) benefits the Government both from a service standpoint and in that the amounts of service mail pay received by Pan American from the Post Office Department serve to reduce the carrier's subsidy, whereas no similar savings result in the case of Northwest, a non-subsidized operator (R. 59).

Pan American's out-of-pocket costs for the Tokyo mail are around $31,000 annually, about 1% of fully allocated operating expenses (R. 38). On a fully allocated basis, the rate covers 89% of the costs of Tokyo mail. As to the entire Pacific Division, the total yield of all the service mail rates exceeds the fully allocated costs of the entire Pacific mail service, and contributes a small return on allocated investment. For the period April 1, 1955 through September 30, 1956, Pan American received a substantial amount of subsidy for its entire system operations, and any redetermination of the present rate for that period would not provide additional revenue to petitioner but rather would result only in adjustments in appropriations between the Board and the Post

[1] Pan American carries approximately one-third of the Tokyo mail, and the Post Office Department made plain that about 90% of this amount would have been, and will be, shipped by Northwest in the absence of equalization (R. 12).

Office Department. See note 2, *supra*, p. 3. Pan American's entitlement to subsidy for the period October 1, 1956 forward has not been determined. If no subsidy is provided, it will receive as compensation for transporting mail only the aggregate of the various service rates for all of its routes and divisions.

The Court of Appeals affirmed the Board's order as to the equalization feature (Pet., App. B).[3] The court held that Pan American had not shown the rate to be unfair and unreasonable as applied to it; that the Board properly took into account the fact that Pan American would be better off with rate equalization than without it; that a carrier "may be required to charge for a particular service a rate that is not fully compensatory, in the sense that it does not cover fully allocated costs and return"; and that there was no showing of a taking of property without just compensation in that no contention was made of loss on the over-all Tokyo operations, which include the carrying of passengers and freight as well as mail.

ARGUMENT

Contrary to petitioner's suggestion (Pet. 11), this case involves no question of whether the Government can "commandeer mail service without any

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[3] Pan American contended below that the Board in any event should have allowed a rate differential for the savings to the Post Office Department of costs for transportation between San Francisco and Seattle of San Francisco mail shipped by Pan American, a matter as to which the record did not provide an adequate basis for computation. The court remanded the case to the Board to ascertain the volume of mail in this category, and to revise the rate accordingly.

compensation" by requiring a carrier to apply profits from other traffic to support mail transportation. Rather, the court below held only that the statutory requirement that mail rates be "fair and reasonable" (Section 406(a); *infra*, p. 12), does not always preclude, nor did it in the circumstances of this case preclude, the prescription of a particular mail rate at a level below fully allocated costs and full return on allocated investment.[6]

In contending that Section 406 immutably precludes the fixing of such a rate where the carrier objects, petitioner places mistaken reliance on *Northern Pacific Railway Co.* v. *North Dakota*, 236 U.S. 585. That case did not hold that so-called "below cost" rates can never be prescribed. Rather, as pointed out in *B. & O. R. Co.* v. *United States*, 345 U.S. 146, 149, the ground for decision in *Northern Pacific:*

> was that the rates were "unreasonable" and "arbitrary". The Court was careful to point out and emphasize that there was nothing in the records of those cases to show that there were "reasonable" grounds on which to justify imposing non-compensatory rates on the railroads.

Here, as the Court of Appeals held, there were reasonable grounds in that petitioner "is better off by reason of the 'equalized' rate" since it otherwise would be in a worse net revenue position through the

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[6] The Board recognizes that each category of traffic should bear its proportionate share of joint costs where reasonably feasible, and that there must be valid reasons, found by the court to exist here, to justify a departure from that principle.

loss of the mail traffic to its competitor Northwest. Despite petitioner's attempt to distinguish them, the decisions of this Court recognize that, in fixing rates, agencies properly may consider the effect of the rate on the revenue position of the carrier, and require rates over the carrier's protest which will yield a greater dollar return even though they are not fully "compensatory" in the sense in which petitioner contends. *Hudson & Manhattan R. Co.* v. *United States*, 313 U.S. 98, 99; *Market Street Ry. Co.* v. *Railroad Commission of California*, 324 U.S. 548, 557, 563, 566. Such rates are "fair and reasonable", as are other such rates where there are valid public interest considerations which dictate them and where the carrier's over-all business is not required to be conducted at a loss. *B. & O. R. Co.* v. *United States*, 345 U.S. at 150.

Nor are these principles rendered inapplicable to mail rates because the Government is the shipper and because there is a duty to carry mail. Air carriers are required to maintain and provide adequate service to all classes of traffic. 49 U.S.C. 484(a). Just compensation for the transportation of mail is required, as it is in the case of other traffic. But acceptance of this fact does not lead to the conclusion that a mail rate must be established solely on the basis of cost formulæ. Other considerations may be taken into account in the mail rate field, just as they are in other rate situations. In *United States v. Jones*, 336 U.S. 641, the contention was that a carrier had been denied just compensation for the transportation of mail where there was a mandatory duty to trans-

port and where, as here, the agency was required to fix "fair and reasonable rates" for such transportation. The rate fixed by the Interstate Commerce Commission was a class rate (*i.e.*, one applicable to all carriers of a given category), and the lower courts on three separate occasions had held the rate to be too low in relation to the claimant (336 U.S. at 645, 646). There, as here, the contention was that the rates "do not afford just compensation under the Fifth Amendment on the ground that they do not provide for payment of the cost of the service rendered plus a reasonable return upon invested capital allocated to that service" (336 U.S. at 646). The Commission had taken into account many other factors, such as comparisons with freight rates, compensation received from other services in passenger-train cars, and the mail rates received by other carriers for like services. This Court upheld the rate, pointing out, *inter alia*, that the Commission could "consider rates paid to other carriers or their effects" (336 U.S. at 664).[7]

Finally, decisions such as *Federal Power Commission* v. *Hope Natural Gas Co.*, 320 U.S. 591, and *B. & O. R. Co.* v. *United States*, 345 U.S. 146, cited and relied upon by the Court of Appeals, show that, in order successfully to challenge a rate, more is re-

[7] Under petitioner's view, the Board could not fix class rates at any level other than the one necessary to fully compensate the highest cost of carriers of the class, despite the power conferred by Section 406 to fix class mail rates and the prior recognition by this Court of the importance of such rates as a regulatory device. *T.W.A.* v. *Civil Aeronautics Board*, 336 U.S. 601, 606-607.

quired than to assert that an erroneous legal theory has been applied or that the particular rate, viewed in isolation, is "below cost." The question is one of over-all impact and effect. As the Court of Appeals pointed out, "PAA does not contend it will lose money on its over-all Tokyo business, which includes carrying passengers and freight as well as mail." For the period April 1, 1955 through September 30, 1956 the Board's rate actually has no impact at all on petitioner since, as previously pointed out (*supra*, p. 5), the carrier received substantial subsidy payments and any recomputation of the rate for that period would result only in adjustments of appropriations between the Board and the Post Office Department. Whether additional mail pay in the form of subsidy will be provided after October 1, 1958 is problematical. If subsidy is provided, again the instant rate will have no practical adverse effect on petitioner. If there is no subsidy, the Board's determination that the carrier is economically self-sufficient necessarily will constitute a finding that petitioner's operations, viewed in their entirety, are yielding an over-all fair return. And apart from these considerations, there is no Fifth Amendment taking where, as here, the Board has found, and its finding has been upheld, that the carrier is financially "better off" by reason of the "equalized" rate which it attacks.

CONCLUSION

The decision below is correct, there is no conflict of decision, and no substantial question warranting review by this Court is presented. The petition for a writ of certiorari should be denied.

Respectfully submitted,

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SEPTEMBER 1958.

APPENDIX

The relevant provisions of the Civil Aeronautics Act of 1938 (52 Stat. 973), as amended (49 U.S.C. 401, *et seq.*), are:

RATES FOR TRANSPORTATION OF MAIL.

Authority to Fix Rates

SEC. 406. [52 Stat. 998, 49 U.S.C. 486] (a) The Authority [Board] is empowered and directed, upon its own initiative or upon petition of the Postmaster General or an air carrier, (1) to fix and determine from time to time, after notice and hearing, the fair and reasonable rates of compensation for the transportation of mail by aircraft, the facilities used and useful therefor, and the services connected therewith (including the transportation of mail by an air carrier by other means than aircraft whenever such transportation is incidental to the transportation of mail by aircraft or is made necessary by conditions of emergency arising from aircraft operation), by each holder of a certificate authorizing the transportation of mail by aircraft, and to make such rates effective from such date as it shall determine to be proper; (2) to prescribe the method or methods, by aircraft-mile, pound-mile, weight, space, or any combination thereof, or otherwise, for ascertaining such rates of compensation for each air carrier or class of air carriers; and (3) to publish the same; and the rates so fixed and determined shall be paid by the Postmaster General from appropriations for the transportation of mail by aircraft.

Rate-Making Elements

(b) In fixing and determining fair and reasonable rates of compensation under this section, the Authority [Board], considering the conditions peculiar to transportation by aircraft and to the particular air carrier or class of air carriers, may fix different rates for different air carriers or classes of air carriers, and different classes of service. In determining the rate in each case, the Authority [Board] shall take into consideration, among other factors, the condition that such air carriers may hold and operate under certificates authorizing the carriage of mail only by providing necessary and adequate facilities and service for the transportation of mail; such standards respecting the character and quality of service to be rendered by air carriers as may be prescribed by or pursuant to law; and the need of each such air carrier for compensation for the transportation of mail sufficient to insure the performance of such service, and, together with all other revenue of the air carrier, to enable such air carrier under honest, economical, and efficient management, to maintain and continue the development of air transportation to the extent and of the character and quality required for the commerce of the United States, the Postal Service, and the national defense.

* * * *

Reorganization Plan No. 10 of 1953 (67 Stat. 644) provides:

Payments to Air Carriers

SECTION 1. *Transfer of functions.*—There are hereby transferred to the Civil Aeronautics

Board (hereinafter referred to as the "Board") the functions of the Postmaster General with respect to paying to each air carrier so much of the compensation fixed and determined by the Board under section 406 of the Civil Aeronautics Act of 1938 (52 Stat. 998, as amended, 49 U.S.C. 486), as is in excess of the amount payable to such air carrier, under honest, economical, and efficient management, for the transportation of mail by aircraft, the facilities used and useful therefor, and the services connected therewith at fair and reasonable rates fixed and determined by the Board in accordance with that section without regard to the following provision of subsection (b) thereof: "the need of each such air carrier for compensation for the transportation of mail sufficient to insure the performance of such service, and, together with all other revenue of the air carrier, to enable such air carrier under honest, economical, and efficient management, to maintain and continue the development of air transportation to the extent and of the character and quality required for the commerce of the United States, the postal service, and the national defense."

SEC. 2. *Interim provisions.*—The Board may fix, without prior notice and hearing, the initial rates to be paid by the Postmaster General under this reorganization plan for mail-transportation services rendered on and after the date when the plan becomes effective. At any time thereafter the Board upon its own motion may, and upon the petition of the Postmaster General or the carrier concerned shall, institute new proceedings to fix and determine, after notice and hearing, the rates to be paid by the Postmaster Gen-

eral in accordance with section 1 of this reorganization plan, and the rates so fixed and determined shall supersede the initial rates from the date of the motion or petition.

SEC. 3. *Incidental transfers.*—There shall be transferred from the Post Office Department to the Board so much of the personnel, property, records, and unexpended balances of appropriations, allocations, and other funds, employed, held, used, available, or to be made available in connection with the functions transferred by this reorganization plan as the Director of the Bureau of the Budget deems to be required for the performance of those functions. Such measures and dispositions as the Director of the Bureau of the Budget shall deem to be necessary in order to effectuate the transfers provided for in this section shall be carried out in such manner as he shall direct and by such agencies as he shall designate.

SEC. 4. *Effective date.*—The provisions of this reorganization plan shall take effect on the first day of the first calendar month following forty-five days after the date they would take effect under section 6 (a) of the Reorganization Act of 1949, as amended, in the absence of this section, and shall be applicable only with respect to services rendered on and after the date on which the reorganization plan takes effect under this section.

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